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NO. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1992

Pitman A. Buck, Jr. & Nellwyn A. Buck,
Petitioners

v.

United States of America,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Pitman A. Buck, Jr., Pro se
Nellwyn A. Buck, Pro Se
2525 Sunnycrest Dr.
Texas City, TX 77590
Ph. (409) 948-3396

QUESTIONS PRESENTED FOR REVIEW

QUESTION 1

DID THE FIFTH CIRCUIT COURT OF APPEALS STRICTLY CONSTRUE THE PENAL STATUTE 26 U.S.C. §6702?

QUESTION 2

DO THE PETITIONERS HAVE A FIRST AMENDMENT RIGHT TO BELIEVE THAT WAGES, SALARIES, AND EARNED PENSIONS DO NOT CONSTITUTE INCOME AND IF THEY HAVE THIS RIGHT, IS IT POSSIBLE FOR THEM WHEN HOLDING SUCH BELIEF AND ACTING IN THEIR PERSONAL CAPACITIES TO DECLARE ANY ONE OR MORE OF THESE ITEMS AS INCOME ON A FORM 1040 AND WILLFULLY SIGN THE FORM 1040 JURAT WITHOUT COMMITTING PERJURY?

QUESTION 3

DID THE COURT BELOW COMMIT ERROR BY DISMISSING THE PETITIONERS' APPEAL INASMUCH AS THE DISTRICT COURT GRANTED SUMMARY JUDGMENT TO THE RESPONDENT DESPITE THE FACT OF THE PETITIONERS' CLAIMED BELIEF THAT WAGES, SALARIES, EARNED PENSIONS, ETC., ARE NOT INCOME?

QUESTION 4

WAS THE PETITIONERS' RIGHT TO DUE PROCESS VIOLATED BY IRS FAILURE TO COMPLY WITH THE §6203 MANDATE TO FURNISH THEM WITH THEIR REQUESTED COPY OF THE ASSESSMENT FORM 23-C?

QUESTION 5

DID THE COURT BELOW COMMIT ERROR BY GRANTING TO THE RESPONDENT SUMMARY JUDGMENT IN THE FACE OF THE IRS INTERNAL MEMORANDUM THAT CLEARLY INDICATES THE POSSIBILITY THAT THE $500 PENALTY AGAINST PETITIONERS WAS NOT PROPERLY ASSESSED?

QUESTION 6

IS IT LOGICALLY AND LEGALLY POSSIBLE FOR LUCAS V. PILLIOD LUMBER CO., 281 U.S. 245 (1930), TO BE APPOSITE TO THE INSTANT CASE?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT COURT

OPINIONS BELOW

A copy of the circuit court's opinion dismissing the Petitioners' appeal appears as Appendix A. Appendix B is a copy of the district court's dismissal of Petitioners' COMPLAINT. Appendix C is a copy of the appellate court's denial of the Appellants' petition for rehearing en banc, which was treated as a petition for panel rehearing. Appendix D is the circuit court's first dismissal of case. Appendix E is the district court's entry of judgment. Appendix F is the circuit court's entry of judgment and issuance of mandate.

JURISDICTION OF THIS COURT

This is a civil appeal from the judgment of the Fifth Circuit Court of Appeals that was entered on August 10, 1992. On August 31, 1992, permission was granted extending the time for the Petitioners to file a petition for rehearing to September 7, 1992. On September 14, 1992, the

Petitioners' Petition for En Banc Rehearing, which was treated by the court as a petition for rehearing, was denied. On October 6, 1992, the Petitioners' motion for stay of the mandate was denied. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONS AND STATUTES INVOLVED

The texts of the first, fourth, and fifth amendments to the Constitution are set forth in appendixes G, H and I, respectively. The text of 26 U.S.C. §7206 is set forth in Appendix J. The text of 26 U.S.C. §6702 is set forth in Appendix K.

STATEMENT OF THE CASE

The Petitioners filed an unsigned 1988 IRS Form 1040. Together with the *unsigned* but what the IRS called "an otherwise completed form" *[sic]*, the Petitioners mailed to the IRS an affidavit that stated their intention to retain all their rights under the Constitution and two checks the sum of which when added to money already sent to the IRS totaled over $28,000.

The Petitioners did not sign the jurat of the Form 1040 because through years of study they have come to *believe* that wages, salaries, and earned pensions, etc., do not constitute income. Therefore, the Petitioners are unable to fill in line 7 of the Form 1040 with any of these items and *conscientiously* and in *good faith* sign the form's prescribed jurat and thereby self-assess a tax liability based upon a political proposition that they understand and believe to be in conflict with the meaning of "income" as used in and by the states when the Sixteenth Amendment was ratified and defined by this Court as a "gain or profit."

The Petitioners are not "tax protesters" as the Criminal Investigation Division of the IRS has classified them and so would have the courts to believe but are honest citizens who are unwilling to make any statement or tax return under penalties of perjury that they do not know or believe to be true and then pretend they did so "willfully" in mockery of §7206.

The Petitioners here seek review of the Fifth Circuit Court of Appeals' dismissal of their appeal to that court from the judgment of the federal district court in Galveston which ruled that the Petitioners were liable for the

payment of a $500 penalty imposed under color of §6702 for failing to sign under penalties of perjury a 1988 Form 1040. In effect, the Petitioners were fined $500 because they *refused* to *willfully* sign the 1988 Form 1040 jurat and thus falsely state under penalties of perjury their knowledge and belief in order to self-assess taxes against themselves based upon a political proposition they do not believe. The bases for federal jurisdiction in the court of first instance are 26 U.S.C. §6703 and 28 U.S.C. §§§1331, 1340, 1346(a).

ARGUMENTS

QUESTION 1

DID THE FIFTH CIRCUIT COURT OF APPEALS STRICTLY CONSTRUE THE PENAL STATUTE 26 U.S.C. §6702?

On page 6328 of its decision dismissing the Petitioners' appeal, the court below said:

> "The Bucks argue that an unsigned return is not a 'return' and, therefore, they cannot be assessed a penalty for filing a frivolous return. In addition to being raised for the first time on appeal, their argument is patently frivolous."

As the Petitioners pointed out in their petition for rehearing, the latter statement by the court is in error. On page 5 of their original Form 843 claim the Petitioners stated:

> "An unsigned return is not a return and therefore cannot be the subject of consideration under section 6702 of the Internal Revenue Code."

On page 6 of their amended Form 843 they argued that,

> "An unsigned *[sic]* 1040 tax return may not be the subject of consideration under section 6702 of the Internal Revenue Code."

Thus, the court erred when stating that this argument by the Petitioners was "raised for the first time on appeal." The Petitioners merely expanded this argument in their Reply Brief and Supplemental Brief when they argued that,

"As counsel know, the last and necessary act of an individual's 'self-assessment' of taxes ... is the individual's act of signing an assessment document, such as an IRS Form 1040." (Bold original)

And that,

"An unsigned return does not assert, declare, affirm, purport or reflect 'the self-assessment' of taxes or 'tax liability,' and therefore an unsigned return is no return at all, not even a frivolous return." (Bold original)

In considering the question at hand, it is essential to distinguish between an unsigned Form 1040 and one that has been properly signed under the penalties of perjury. Both courts below and government's counsel in their Reply Brief cited or compared many *signed* returns that courts had held to be frivolous in order to prove that the Petitioners' *unsigned* Form 1040 is also a frivolous return. This is worse than comparing apples to oranges; it's like comparing an executed will to an unexecuted document over which family members are squabbling, or like comparing an executed contract to a document wherein one of the parties named refused to sign the document. As attested to by Supreme Court cases and other cases here cited, neither an assessment of tax deficiency by the IRS nor "the self-assessment" of a tax liability by an individual is possible under the Internal Revenue Code using an unsigned document. The text of §6702 clearly delineates "the self-assessment" (of a tax liability) as the necessary component by which the criteria of §6702 make it possible to determine whether "the purported return" or "what purports to be a return of the tax imposed by subtitle A" is a frivolous return, even though "the self-assessment" is in error.

The Congress in 1934 for the first time enacted a law concerning certain individuals and spouses signing tax Form 1040. Paragraph A, Sections 51(a) and 51(b), of the Revenue Act of 1934 provides in part:

"(a) Requirement.-The following individuals shall each make under oath a return stating.... (b) Husband and Wife.-(1) Each shall make such a return, ..." (2) The income of each shall be included in a single joint return...." [Bold added.]

The language of the Internal Revenue Act of 1934 is abundantly clear that tax returns are made "under oath." It follows that where no oath is made, no tax return is made.

Section 135 of the Revenue Act of 1942 provides that returns by individuals contain a declaration that the return is made **under the penalties of perjury** in lieu of oath:

> "The following individuals shall each make a return, which shall contain or be verified by a written declaration that it is made under the **penalties of perjury,** ...." (Bold added.)

In 1943 Congress enacted the Current Tax Payment Act of 1943, in which §1630 of Sub-chapter E of Chapter 120 reads:

> "Sec. 1630. Verification of Returns, etc. "(a) Power of Commissioner to Require.-The Commissioner, under regulations prescribed by him with the approval of the Secretary, may require that **any return,** statement, or other document required to be filed under this chapter shall contain or be verified by a written declaration that it **is made under the penalties of perjury,** and such declaration shall be in lieu of any oath otherwise required." (Bold added.)

Section 3809(c) of the 1949 Code reads:

> "(c) Verification in Lieu of Oath. The Commissioner, under regulations prescribed by him with the approval of the Secretary, may require that **any return,** statement, or other document required to be filed under any provision of the internal revenue laws shall contain or be verified by a written declaration that it **is made under the penalties of perjury,** and such declaration shall be in lieu of any oath otherwise required." (Bold added.)

Section 6065 of the present Code states,

> "Except as otherwise provided by the Secretary, **any return,** statement, or other document required to be made under any provision of the internal revenue laws or regulations shall contain or be verified by a written statement that it **is made under the penalties of perjury.**" (Bold added.)

Clearly, tax returns earlier were made "under oath" but now are made "under the penalties of perjury." The point is that **tax returns are made under the penalties of perjury** whereas earlier **they were made under oath** but the same logic holds; i.e., that in a situation where - as in the instant case - the *requisite* written declaration or verification was **not** made **on the face** of the Form 1040 then no tax return was made and therefore none exists.

The language of all these revenue acts as well as Treasury Decision 4512 confirm, and the courts have repeatedly held, that no return exists where a Form 1040 jurat is not signed or is struck, and it is contradictory for the IRS to argue, as it did in *Vaira, infra*, that "the filing of an unsigned form does not constitute the filing of a return" but now argue that the Petitioners' unsigned Form is a return, howbeit a frivolous return.

It is quite plain that it is the *jurat*, signed and filed with the Form 1040, that is the legal *device* under which an individual makes "the self-assessment" of a tax liability that, by definition, is a necessary component of any tax return, including "the self-assessment" made in a frivolous return. The fact is that the Petitioners' unsigned Form 1040 makes no "self-assessment" of a tax liability because their requisite signatures are missing, and it is obvious "on its face" that their unsigned Form 1040 does not plausibly purport to be in *compliance* with the requisite verification under which a return is declared as made.

IRS Fact Sheet 78-1 which is in the record confirms the above analysis by the Petitioners:

"The Tax Equity and Fiscal Responsibility Act provides for immediate assessment of a $500 penalty against any taxpayer who in furtherance of a frivolous position (protester type return) or with a clear intent to impede administration of the law:

> "- files a purported return that fails to contain sufficient information from which a reasonably correct tax liability can be determined,
>
> "- or clearly indicates that the tax liability *reflected* is substantially incorrect." (Emphasis added.)

It is obvious that a tax liability is not *reflected* on an unexecuted or unsigned return. As the Petitioners pointed out in their Reply Brief (p. 8),

> "...the last and necessary act of an individual's 'self-assessment' of taxes ... is the individual's act of signing an assessment document, such as an IRS Form 1040."

By arguing that the Petitioners' unsigned 1988 Form 1040 is a frivolous return although it lacks "the self-assessment" by which a frivolous return is identified, the court below is in conflict not only with sound logic but with this Court's guidelines in the cases of *Zellerbach Paper Co. v. Helvering*, 293 U.S. 172 (1934) and *Badaracco v. Commissioner*, 464 U.S. 386 (1984).

as to what constitutes a tax return. In their article entitled, "Supreme Court's *Badaracco* decision defines 'return'; bad news for tax evaders," the authors Abbott and St. John examine the question of "What is a 'return'?" and they confirm that even now, after *Zellerbach* and *Badaracco*, much confusion remains:

> "The question of when a return does not constitute a 'return' is significant. It has arisen in several contexts, including failures to file prosecutions, and the courts are actually divided." 60 J. Taxn. 202 (1984.)

After arguing in *Vaira* and many other cases that a filed Form 1040 whose jurat is unsigned is no return at all, the IRS argues in the instant case, and the court below agrees, that Petitioners' unsigned Form 1040 is a return under § 6702. The government simply can't have it both ways!

The en banc appeals court in *United States v. Kimball*, 925 F.2d 356 (9th Cir. 1991), ruled that,

> "It is not incongruous to hold that an individual has failed to file a tax return under section 7203 and, nevertheless, has filed a frivolous purported return under section 6702. One can submit a document which purports to be a tax return, but which fails to meet the requirement for filing."

The language of the *Kimball* en banc court suggests that Kimball violated both §7203 and §6702. *United States v. Kimball*, 896 F.2d 1218 (9th Cir. 1990), at 1218 states that Mr. Kimball "signed his name 'Ted Kimball' at the bottom of the form." This suggests that he did not sign the jurat and if he did not, he could not have filed a frivolous return the criteria of which require "the self-assessment" of tax liability in order to identify a frivolous return. 33 *Am Jur 2d* states:

> "§1471. Returns must be signed and complete. A tax return must meet all the procedural requirements of the law or else it may fail to qualify as a 'return' for purposes of starting the 3-year limitations period on assessment or avoiding penalties. One of the most important requirements is that every return must be signed in accordance with the instructions on the return form.[34]"

This Court in *Zellerbach*, *supra*, and *Badaracco*, *supra*, gave some guidelines by which to identify a return and they apply equally to a frivolous

return inasmuch as §6702 concerns itself with "what **purports** to be a **return of tax**" and clearly refers to such **"a return"** as a **"purported return"** on which **"the self-assessment"** of tax liability is made. (Bold added.) The Petitioners will herein further argue this point but for now will quote an excerpt from each of these cases:

> "Perfect accuracy or completeness is not necessary to rescue a return from nullity, **if it purports to be a return, is sworn to as such . . .**, and evinces an honest and genuine endeavor to satisfy the law." *Zellerbach*. (Bold added.)

> "[A] document which **on its face** ... plausibly **purports** to be in compliance and **which is signed** by the taxpayer, is **a return** despite its inaccuracies." *Badaracco*. (Bold added.)

The Fifth Circuit Court of Appeals in *Brafman v. United States*, 384 F.2d 863 (5th Cir. 1967), confirms that where no valid assessment of a tax liability is made by requisite signature, the result is a nullity and consequently no return exists to start the running of the statute of limitations:

> "Certainly the courts have not hesitated to enforce strictly the Code requirement that a taxpayer's returns **must** be *signed* to be *effective*. Thus, *unsigned* returns, even with remittances, have been viewed as *nullities* from the standpoint of penalties and of commencement of the running of the statute of limitations. It has availed the taxpayer little that his failure to sign was inadvertent. The threshold issue of the **validity of the assessment** is crucial. We reverse on the ground that **a valid assessment** against the transferrer's estate was not made, because of an assessment officer's *failure to sign* the certificate of assessment [Form 23C]. ... Since the certificate [Form 23C] *lacks* the **requisite signature,** it cannot constitute a valid assessment. ... The Treasury Regulations are binding on the Government as well as on the taxpayer: 'Tax officials and taxpayers alike are under the law, not above it.' Pacific National Bank of Seattle v. Commissioner, 9 Cir. 1937, 91 F.2d 103, 105. Even the instructions on the reverse side of the assessment certificate, Form 23C, specify that the original form 'is to be transmitted to the District Director for signature, after which it will be returned to the Accounting Branch for permanent filing.'" (Bold and italics added.)

The lesson of the United States Fifth Circuit Court of Appeals in *Brafman* is: where there is **no valid assessment,** there is **no return.** This rule explains

why the language of paragraphs (A) and (B) in §6702 is *focused* upon **"the self-assessment"**, about which the substantial "correctness" or "incorrect[ness]" must be determined to identify a frivolous return. But **"the assessment"**, as *Brafman* teaches, must be **"a valid assessment"** which is clearly *absent* on the Petitioners' Form 1040 inasmuch as **"the**[ir] **signature**[s]" are missing. Hence, the emphasis by the Fifth Circuit Court in *Brafman* that, in determining whether a tax return has been filed, "The *threshold issue* of the **validity of the assessment** is *crucial*." (All emphases added.)

United States v. Moore, 627 F.2d 830 (7th Cir. 1980):

> "**The forms** defendant supplied to the I.R.S. **were not returns** for another reason: **they were not verified.**" (Bold.)

And from *Vaira v. Commissioner of Internal Revenue*, 444 F.2d 770 (3rd Cir. (1971):

> "By statute a return is required to be **signed** in accordance with forms of prescribed regulations. 26 U.S.C. §6061. Without a signature, a return is not verified and cannot be subject to the penalties for perjury mandated by the Code. 26 U.S.C. §6065 (a). **Accordingly,** it has been held that **a return filed unsigned is no return at all.** *Dixon v. Commissioner of Internal Revenue*, 28 T.C. 338 (1957)." (Bold added.)

In *Theodore R. Plunkett*, 41 B.T.A. 700, affd. 118 F.2d 644, the taxpayer through inadvertence failed to sign and swear to his "purported" return for 1934. The Tax Board held:

> "The **purported** income tax return of the petitioner mailed by the petitioner from Adams, Massachusetts, on March 15, 1935, was not a return required by the statute. **It was no return at all.**" (Bold added.)

Peter Vaira and Mary L. Vaira, Petitioners v. Commissioner of Internal Revenue, Respondent, 52 T.C. 986 (1969):

> "Respondent ... argu[es] that **the filing of an unsigned form does not constitute the filing of a return....** We agree. (Bold added.)

Thus, it can be seen that the Petitioners did not invent the argument that **"an unsigned return is no return at all,"** *Vaira, supra,* and it must be observed that government's counsel in the instant case cited *Vaira* in their

bad faith attempt to prove just the opposite of what the IRS has argued in the past and with which the courts have for many years agreed. The government simply cannot have it *both* ways!

In the tax court hearing of the case (Vaira was a beneficiary of a gain from a state legacy that he voluntarily accepted), the Court's attention is called to the fact that the judge stated he had searched the statutes requiring returns to be signed and he concluded:

"Yet no specific penalty is provided for a failure to sign."

By sanctioning the Petitioners $1,500 for filing an alleged "frivolous appeal" because they argued "that an unsigned return is not a return" and by calling this argument "patently frivolous" (6328), the Fifth Circuit Court of Appeals has demonstrably contradicted itself. Citizens have a right to rely on **something** and the Petitioners relied on the revenue acts cited, T. D. 4512, the Internal Revenue Code, the cited court decisions, and other court rulings that, **"a return filed unsigned is no return at all."** The law and the authorities above make it crystal clear that an unsigned return is a nullity - nothingness - and hence it is absurd to penalize the Petitioners under §6702 for filing what is legally nothing!

After correctly quoting the full text of §6702 in both *Mosher* and the instant case, the court misconstrued §6702 in *Mosher*, said to control the instant case, by stating,

"The absence of the verification precludes the IRS from judging the 'substantial correctness' of the return *[sic]*...."

In the instant case the court repeats its *literal* misconstruction of §6702 and the court's flawed concept of §6702 is vividly demonstrated in the following two statements taken from the court's written decision in dismissing the Petitioners' appeal:

> The absence of the Bucks' signatures on the return "precludes the IRS from judging the 'substantial correctness' of the return *[sic]* because the required 'information' that the return has been verified under 'penalty of perjury' is absent." (p. 6327.)
>
> The undisputed facts show that the Bucks prevented the Commissioner from judging the substantial correctness of their Form 1040 *[sic]* and that the Bucks filing of the unsigned return is based on a frivolous position. (p. 6328.)

Of course, §6702 states absolutely **nothing** about "the substantial correctness of ... Form 1040" *[sic]* and §6702 states **nothing** about "the 'substantial correctness' of the return" *[sic]*; the correct phraseology in §6702 is:

> "...the substantial correctness of the *self-assessment*". (Emphasis added.)

The Petitioners further demonstrate below the court's misconstruction of §6702. The demonstration is limited to only ¶¶ (A) and (B) as these are the paragraphs that the IRS and the courts below have twisted, misquoted and misapplied:

A. The §6702 statute provides the criteria to determine if a return or purported return is frivolous, (thus the term, "frivolous return").

B. This determination of frivolity is made by a judgment of "the substantial correctness of the self-assessment" or by facial examination of the return's information that indicates that "the self-assessment" of "the purported return" is "substantially incorrect" and it is obvious that where no self-assessment exists, no determination of frivolity is possible.

C. Moreover, *Brafman* teaches that any assessment having legal effect must be validated by proper signature. The rule applies to all, tax officials and taxpayers alike.

D. Reason forces the conclusion that in the absence of the **requisite** signature(s) **no *valid* self-assessment** exists and therefore no determination of frivolity, such as a frivolous return, can be made. What does not exist cannot be judged, either as to correctness or incorrectness.

In its records the IRS assesses "the self-assessment" made on *signed* returns that the IRS designates as frivolous returns, thus starting the statute of limitations period. However, the IRS makes no assessment with regard to unsigned Form 1040s that it claims are also frivolous returns. The reason is obvious; no self-assessment" of tax liability exists on unsigned 1040 forms, hence no limitations period may legally begin with the filing of unsigned, so-called frivolous returns. Thus internally, the IRS treats some "frivolous returns" differently from others while categorizing them all to the courts as "frivolous returns." Also, some unsigned Form 1040s are treated

as frivolous while others are not. All of this is made plain in the Petitioners' personal Individual Master File (IMF) for the years 1984, 1985, 1986, 1987 and 1988 received from the IRS through the Privacy Act and the Freedom of Information Act. The IMF data is tabulated below:

YR	CODE	DATE	SIGNED/UNSIGNED?
1984	TC 150	082685	DID NOT SIGN JURAT
1985	TC 150	110386	DITTO
1986	TC 150	021588	DITTO
1987	TC 610	041588	DITTO
1987	TC 150	121988	SIGNED JURAT UNDER THREAT OF §7203.
1988	TC 430	062088	DID NOT SIGN JURAT; §7203 THREAT
1988	TC 610	041989	§6702 $500 PENALTY

LEGEND: (TC means "transaction code")
TC 150 means "Return filed and tax liability assessed."
TC 430 means "Estimated tax declaration."
TC 610 means "Remittance with return."

This IMF information reveals that for three years ('84, '85 and '86) the Petitioners filed unsigned Form 1040s and everything was normal until the Petitioners received an IRS letter threatening to prosecute them under §7203 if a valid or "proper return" was not filed for 1987.

The main points that the Petitioners want to prove here: that the first entry on the IMF for 1987 does not show a TC 150 to indicate the IRS assessment of tax liability; that it was *after* the Petitioners caved in to the threat of §7203 prosecution and "willfully" *[sic]* signed the 1987 Form 1040 that the IMF code for 1987 was changed to TC 150 to indicate an assessment of a tax liability; that Petitioners' unsigned 1988 Form 1040 remains unsigned and has been labeled a "frivolous return" despite the absence of "the self-assessment" which the §6702 criteria utilize to identify a frivolous return. The proof is in the IMF pudding that the Petitioners' 1988 unsigned Form 1040 is not a frivolous return inasmuch as it does not make the requisite, verified "self-assessment" of a tax liability that enables the IRS to record the

assessment on its books; the clincher: the absence of TC 150 on the IMF for the year 1988!

In *Myles Salt Co. v. Commissioner of Internal Revenue*, 49 F.2d 232 (5th Cir. 1931), the court below stated that,

> "The return which will date the beginning of the limitation period, and lack of which will prevent limitation, is one made in substantial conformity to the law that required it."

It is clear that the Petitioners' unsigned Form 1040 is not in substantial conformity with the lower court's own understanding of the law as stated in *Myles Salt Co., supra.*

The court in *Bothke v. Fluor*, 713 F.2d 1405, (9th Cir. 1983), stated:

> "For the condition precedent of liability to be met, there must be a lawful assessment, either a voluntary one by the taxpayer or one procedurally proper by the IRS. Because this country's income tax system is based on voluntary self-assessment, rather than distraint, *Flora v. United States*, 362 U.S. 145, 176, 89 S.Ct. 630, 646-47, 4 L.Ed. 623 (1960), the Service may assess the tax only in certain circumstances and in conformity with proper procedures." (Bold added.)

Where no voluntary tax return is filed, as in the instant case, the Code under §6020(b) gives the IRS all the authority it has under the Constitution to file one. Of course, the IRS knows this but with no limitations period running, the IRS would rather harass the Petitioners to death rather than utilize §6020(b).

The petitioners take note that in both the *Zellerbach* and *Badaracco* guidelines to identify a return, this Court used the word "purports." *Black's Law Dictionary*, 6th ed., defines the verb "purports" thusly:

> "To convey, imply, or profess outwardly; to have the appearance of being, intending, claiming, etc."

The Petitioners make the observation that the congressional staff members who wrote §6702 were probably aware, if not certainly aware, of this Court's use of the term "purports" in *Zellerbach* and for this reason purposely included the term "purports" in their construction of §6702.

Taken collectively, the word "purports" as used in *Zellerbach*, *Badaracco* and in §6702 certainly conveys the sense of professing outwardly an intent or claim.

This Court in *Badaracco* has ruled that:

> "a document which on its face ... plausibly purports to be in compliance and which is signed by the taxpayer, is a return despite its inaccuracies." (Bold added.)

Thus, the intent or the *conveyance* of the idea by which any individual purports to file "a return" must appear on the face of what the person "purports to be a return." Doubtless, the Form 1040 jurat signed by an individual was meant to serve that very purpose. It is abundantly clear that the Petitioners' unsigned Form 1040 is not a return that makes "the self-assessment" of a tax liability, nor is it a return that on its face even plausibly purports to be a return because the Form 1040 is not signed by anybody, nor did Petitioners intend for the Form 1040 to be a return inasmuch as they were unable to *conscientiously* sign the jurat in *good faith*. The authorities cited herein and the text of §6702 prove that both courts below literally misconstrued §6702 and misapplied §6702 in the instant case. Penal statutes must be strictly construed for the law to have its desired effect and for justice to prevail. *C.I.R. v. Acker*, 361 U.S. 87 (1959), *Salley v. United States*, 239 F.Supp. 161 (5th Cir. 1965).

QUESTION 2

DO THE PETITIONERS HAVE A FIRST AMENDMENT RIGHT TO BELIEVE THAT WAGES, SALARIES, AND EARNED PENSIONS DO NOT CONSTITUTE INCOME AND IF THEY HAVE THIS RIGHT, IS IT POSSIBLE FOR THEM WHEN HOLDING SUCH BELIEF AND ACTING IN THEIR PERSONAL CAPACITIES TO DECLARE ANY ONE OR MORE OF THESE ITEMS AS INCOME ON A FORM 1040 AND WILLFULLY SIGN THE FORM 1040 JURAT WITHOUT COMMITTING PERJURY?

The Form 1040 jurat reads in pertinent part:

> "Under penalties of perjury, I declare that I have examined this return and accompanying schedules and statements, and to the best of my knowledge and belief, they are true, correct, and complete....." (Bold added.)

Black's Law Dictionary, 6th ed., defines "belief" as,

"A state or habit of mind in which trust, confidence, or reliance is placed in some person or thing; confidence, faith."

The perjury statute of the Internal Revenue Code, §7206, declares who is guilty of perjury, specifies the penalties for its offense and describes how or in what manner a return is made:

"Any person who- ... **Willfully** makes and subscribes any **return**, statement, or other document, which contains or is verified by a written declaration that **it is made under the penalties of perjury,** and which *he does not believe to be true and correct as to every material matter ... shall be guilty of a felony* and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation) or imprisoned not more than 3 years, or both, together with the costs of prosecution." (Emphases added.)

Black's Law Dictionary, 6th ed., defines the term "willful" as meaning,

"Proceeding from a conscious motion of the will; voluntary; knowingly; deliberate. Intending the result which actually comes to pass; designed; intentional; purposeful; not accidental or involuntary."

Section 7206 in most solemn terms assures the Petitioners that they had better not sign any statement *under penalties of perjury if they do not believe it to be true and correct as to every material matter*. Therefore, according to the inherent terms of the jurat itself the decision to sign or not to sign any *prescribed* statement or make a return under the penalties of perjury is *dependent* upon an individual's state of mind and belief. The explicit language of §7206 plainly indicates that the act of signing the jurat of a Form 1040 is intended to be a *willful* act *dependent* upon the potential affiant's or Petitioners' "knowledge and belief." This is so because coercion of the Petitioners' signatures (or of others) makes a mockery and a sham of the very purpose of the jurat. The penalty imposed against the Petitioners under color of §6702 is inapposite because the *objective* criteria of §6702 are legally inadequate to determine any facet of the Petitioners' state of mind. *Hudson v. United States*, 776 F.2d 1288 (9th Cir. 1985) and *Knottnerus v. United States*, 582 F.Supp. 1572 (D.C.Ill. 1984), *Buck v. United States*, 756 F.Supp. 1014 (S.D.Tex. 1991). The government's attempt to compel the Petitioners by threats of criminal prosecution under §7203 and impositions of $500 penalties under color of §6702 to sign the 1040 jurat despite their

true belief is nothing less than mental tyranny! George Orwell's *1984* Big Brother in Oceania's Ministry of Truth would be proud of such mockery and oppression.

Inherent in the perjury statutes is the fundamental precept that no individual acting in his\her own *personal* capacity may be coerced to sign under penalties of perjury a declaration that he\she does not *believe* and the Petitioners were simply appalled to learn in the judgment against them that any court could hold otherwise. The issue involved in the Petitioners' being penalized under 26 U.S.C. §6702 for refusing to sign the Form 1040 jurat can never be addressed *properly* as long as the courts insist that §6065 *requires* the Petitioners to declare *knowledge and belief* on the prescribed Form 1040 jurat while candidly ruling that under §6702 their *state of mind* and *good faith belief* are irrelevant! This is the epitome of the disingenuousness by which the Petitioners are striped of any defense for not signing the jurat, the *legal* signing of which under §7206 is plainly dependent upon their state of mind and good faith ability to do so. Petitioners, who timely demanded a jury trial, stood ready to stand before a jury of peers that it may have judged the sincerity of their belief but this possibility was thwarted by the misapplied penalty under §6702 whose "purely objective" criteria are inapposite to the task of judging the sincerity of the Petitioners' declared and claimed belief that wages, salaries, earned pensions, etc., are not income.

The essence of the question here being considered is whether the Petitioners' signing under penalties of perjury the Form 1040 is conditional upon their state of mind and good faith belief that wages, salaries, earned pensions, etc., are income. Put differently, may the government force them to sign the jurat despite their state of mind and belief [that] these items are not income? If such coercion as Petitioners have suffered is permissible, why have the jurat in the first place? Just demand that they sign any statement deemed to be in the interest of the country and be done with it! Unless this nation's judiciary system has undergone a radical change unknown to the Petitioners, §7206 and the predicament of their "knowledge and belief" exempt them from making a tax return. The IRS is free to make a return under authority of §6020(b) or the Petitioners will be glad to give the IRS regional counsel power of attorney to make one for them if he can do so without the Petitioners waiving any of their constitutional rights.

The district court's quote (at 1017 of its opinion) from *Borgeson v. United States*, 757 F.2d 1071, 1073 (10th Cir. 1985), is misleading in the instant case:

"Nor is noncompliance with the tax law protected by the First Amendment."

What the *Borgeson* court *actually* stated was:

"The requirement of a verification or oath appearing on returns and documents filed with the IRS has been upheld by the Supreme Court on several different occasions, **although not in response to a First Amendment challenge**. See *Zellerbach Paper Co. v. Helvering*, 293 U.S. 172, 55 S.Ct. 127, 79 L.Ed. 264 (1934); *Lucas v. Pilliod Lumber Co.*, 281 U.S. 245, 50 S.Ct. 297, 74 L.Ed. 829 (1930)." (Bold added.)

It is of paramount importance in the instant case to consider the fact that both the *Zellerbach* and *Pilliod* cases cited above by the *Borgeson* court concerned *corporations*. It is obvious that legally-created, *artificial* entities such as corporations do not and cannot possess a First Amendment right to freedom of *belief* or to liberty of *conscience* for the reason that *artificial* entities are not human beings and are incapable of possessing a conscience despite the best efforts of state legislatures and Congress to give them one.

In its dismissal of the Petitioners' appeal, the court below failed to address the essential elements of *personal* belief, liberty of conscience and willfulness that are inherently involved in an individual's decision to sign or not to sign a statement made under penalties of perjury, such as the jurat of Form 1040. Rather than addressing these issues directly the court merely cited *Mosher v. United States*, 775 F.2d 1292 (5th Cir. 1985), at 1295 and *United States v. Lee*, 445 U.S. 252 (1982), at 260 and made a parenthetical statement that is quoted below. Petitioners note that the *Mosher* court also relied upon *Lucas v. Pilliod Lbr. Co., supra*, which case will be addressed under question 6.

The court's reliance upon *Lee, supra*, concerning the Petitioners' claim and First Amendment right to freedom of *belief* and to liberty of *conscience* is completely misplaced. Mr. Lee objected to the compelled payment of Social Security taxes on *religious* grounds. The instant case has nothing whatsoever to do with religious belief and the court's injection of *Lee* is entirely off point. Justice Stevens in footnote 2 of his concurring opinion in *Lee* recognized that,

"The Amish claim is readily distinguishable from the typical claim to an exemption from general tax obligations on the ground that the taxpayer ... ;"

In the instant case Petitioners never raised the issue of the compelled payment of taxes on any grounds, either religious or because of any objection to the government's use of their money. Both these issues are off point. The issue here is whether the Petitioners may be compelled to give testimony under the penalties of perjury contrary to their "knowledge and belief" to satisfy a particular tax policy.

The parenthetical statement referred to above states:

> "(the maintenance of a functional federal tax system is a sufficiently important governmental interest to justify incidental regulation of First Amendment rights)."

It is hardly an "incidental regulation" - nor is it lawful - to require Petitioners to falsely state their "knowledge and belief" by compelling them to sign under penalties of perjury a prescribed Form 1040 affidavit on which the government frames the questions and preordains the answers according to a political proposition that the Petitioners do not believe. As this Court in *West Virginia State Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943), observed,

> "Words uttered under coercion are proof of loyalty to nothing but self-interest."

The IRS practice of coercing the Petitioners in their *personal* capacities to express the view that wages, etc., are income or attempting to compel them - by threats of criminal prosecution under §7203 - to declare under penalties of perjury what they do not know and believe is outrageous, and injury is added to insult by penalizing them $500 for claiming their Fifth Amendment protection from such compelled self-incrimination, self-denial and mental tyranny. It is nature's law that each person must live with his or her own conscience, in peace or in conflict. We choose to live in peace with ours.

This Court in *Ex Parte Bollman*, 8 U.S. (4 Cranch) 75, (1808), re-enunciated a principle of law that will stand forever:

> "...[a] case that cannot be tested by principle is not law."

The Petitioners stand on the principle that any statement or return made under the penalties of perjury must be *willfully* signed. This is the law of "*voluntary* compliance with the tax laws." It is the law to which the IRS often refers but which few people understand. The principle inherent in this law is embedded in the Fifth Amendment's protection against

compelled self-incrimination and compelled self-condemnation as amplified by:

> *Morrissette v. United States*, 342 U.S. 246 (1952); "... as long as in popular belief intention and the freedom of the will are taken as axiomatic, no penal system that negates the mental element can find general acceptance."
>
> *Bellis v. United States*, 417 U.S.85 (1974):
>
> "We have recognized that the Fifth Amendment 'respects a private *inner sanctum* of individual feeling and thought'—an inner sanctum which necessarily includes an individual's papers and effects to the extent that the privilege bars their **compulsory** production and *authentication*—and 'proscribes state intrusion to extract self-condemnation.'" (Bold added.)
>
> *Schmerber v. California*, 384 U.S. 757 (1986):
>
> "All these [Fifth Amendment] policies point to one over-riding thought; the constitutional foundation underlying the privilege is the respect a government—state or federal—must accord to the dignity and integrity of its citizens."

There is, of course, no *requirement* of individuals to *willfully* sign the Form 1040 jurat as such an idea is an oxymoron. The IRS knows this, having contrived the seeming contradictory but correct phrase, "voluntary compliance with the Internal Revenue laws." The Petitioners are in full agreement that *willfully* subscribing the Form 1040 jurat, as the jurat states, "under the penalties of perjury" is in "*voluntary compliance* with the Internal Revenue laws." This is the law and the IRS ought to quit acting as if "willfully" means "required." See *Flora v. United States*, 362 U.S. 145, 176 (1960), and *Bothke v. Fluor*, 713 F.2d 1405, (9th Cir. 1983), *supra*. Thus, it is abundantly clear that the procedure of self-assessment of taxes by making a return under the penalties of perjury is a **voluntary** procedure because it is a procedure designed by the government to be executed **"willfully"** under penalties of perjury. It is equally clear that this does **not** mean that the payment of taxes is voluntary, which is the false conclusion that the government's counsel erroneously attributed to the Petitioners in Respondent's Reply Brief.

Justice Hugo Black declared in *United States v. Kahriger*, 345 U.S. 22 (1953):

"The United States has a system of taxation by **confession**." (Bold added.)

Of course, *compelled* confessions are not legal under the Constitution which is why the Congress mandates the inclusion of the jurat on a Form 1040, thus informing the potential affiant that unless he/she knows and believes the preordained answers to the prescribed questions are known and believed by him/her to be correct, complete and true, then he/she may not be required under §6065 to sign the jurat. Justice Black did not indicate the nature of the **confession** but any legal confession must be 'the product of a rational intellect and a free will,' and in *Flora v. United States*, 362 U.S. 145 (1960), this honorable Court acknowledged the nature of the tax return **confession** when the Court ruled that:

"Our tax system is based upon **voluntary** assessment and payment, not distraint." (Bold added.)

These are not idle words and under the doctrine of *stare decisis*, the people have a right to rely upon the decisions of this Court and not be needlessly penalized for such reliance. *United States v. Mason*, 412 U.S. 391 (1973).

The U.S. Individual Income Tax Return with its prescribed jurat, is designed and intended by the government to be used by individuals for the self-assessment of taxes. In not filing a self-assessed return the Petitioners with confidence relied upon the aforesaid *Flora* ruling.

The certainty of the Petitioners' belief in this *Flora* ruling has been reinforced over the years by independent study (particularly by Petitioner Pitman) of the Constitution, the legislative history of the Sixteenth Amendment, case studies involving the Sixteenth Amendment and articles such as "THE INCOME TAX IS AN EXCISE TAX, AND INCOME IS MERELY THE BASIS FOR DETERMINING ITS AMOUNT" (*Congressional Record*-House, March 27, 1943, pp. 2579-2580) by F. Morse Hubbard. Mr. Hubbard was formerly of the legislative drafting research pool of Columbia University and a former legislative draftsman in the Treasury Department.

This Court in *Beckwith v. United States*, 425 U.S. 341 (1976), stated:

"...a tax return signed by a taxpayer can be the 'starting point' for a prosecution. ... We recognize, of course, that noncustodial interroga-

> tion might possibly in some situations, by virtue of some special circumstance, be characterized as one where the behavior of ... law enforcement officials was such as to overbear petitioner's will to resist and bring about confessions not freely self-determined.... When such a claim is made, it is the duty of an appellate court, including this Court, to examine the entire record and make an independent determination of the ultimate issue of voluntariness. ... ...the dual criminal-civil nature of an I.R.S. interrogation created three misapprehensions for the taxpayer. ... Adequate warnings, or the advise of counsel are essential if such a waiver [of Fifth Amendment protection] is to be effective."

The issue of "voluntariness" has been raised in the instant case by the government's penalizing the Petitioners for not volunteering to sign the jurat of a Form 1040 which is clearly designed and intended to be signed "willfully" under the penalties of perjury. The Petitioners ask this Court to review the judgment below and resolve this issue of voluntariness pursuant to the Constitution.

QUESTION 3

DID THE COURT BELOW COMMIT ERROR BY DISMISSING THE PETITIONERS' APPEAL INASMUCH AS THE DISTRICT COURT GRANTED SUMMARY JUDGMENT TO THE RESPONDENT DESPITE THE FACT OF THE PETITIONERS' CLAIMED BELIEF THAT WAGES, SALARIES, EARNED PENSIONS, ETC., ARE NOT INCOME?

The district court in *Buck v. United States*, 756 F.Supp. 1014 (S.D. Tex. 1991) at 1015 stated:

> "Summary judgment is proper where no genuine issue as to any material fact exists."

The Petitioners brought to the district court's attention an exegesis of Rule 56 as published in 99 F.R.D. 465, 470 by William W. Schwarzer, a federal district judge and noted authority on summary judgment:

> **"Notice, intent, motive and other *states of mind* are common examples of *historical facts* established by inference. A dispute over such an inference is an issue of fact even if the underlying**

> **evidence itself is not in dispute, and it too is a jury issue.**" (Italics and bold emphases added.) Schwarzer, "Summary Judgment under the Federal Rules: Defining Genuine Issues of Material Fact."

"*Belief*," of course, is a state of mind, and as such is an example of an historical fact triable by jury. **A dispute over Petitioners' belief** that wages are not income as a reason for their not signing the jurat **did in fact occur.** On page 13 of its reply brief, the government's counsel made the following statements:

> "Indeed, taxpayers offer no *plausible* reason for their refusal to execute the jurat. Their asserted *belief* (Br. 33) that 'wages are not income' has nothing to do with the jurat." (Italics added)

The first quoted statement above is false and the second statement is ludicrous. Regarding the second statement, if Petitioners' belief "has nothing to do with the jurat", why do the words, "to the best of my knowledge and belief" form a part of the jurat? The answer is quite obvious. Regarding the first quoted statement, the Petitioners in their Opening Brief wrote 12 pages explaining *why* they could not execute the jurat. The reason was distilled into their APPEAL POINT SIX, quoted below *verbatim* except that "Whether" has been replaced with "[THE]":

> "APPEAL POINT SIX. **[THE] Appellants under the First Amendment have the right to their sincere belief that wages are *not* income without being penalized by the IRS under 26 U.S.C. }6702 for their failure to sign a 1988 U.S. Individual Income Tax Return Form 1040 which effectively and explicitly conflicts with Appellants' *belief* that wages are not income and which return if voluntarily signed by the Appellants would cause them to violate the perjury statutes 26 U.S.C. }7206 and 18 U.S.C. }1621 and thereby bring self-incrimination and self-condemnation upon themselves and whose signatures on said return if compelled by law would mock the very purpose of a signed statement made under penalties of perjury and cause the government to violate Appellants' dignity and integrity that under the Fifth Amendment the government is bound to respect.**" (Emphasis original.)

Does this Court think that the Petitioners' *belief* respecting "income" is immaterial to their sober decision not to sign the jurat? Having read *Cheek v. United States*, 498 U.S. ____ (1991), 111 S.Ct. 604, the Petitioners are

persuaded that this Court deems their aforesaid belief to be quite relevant to their decision not to sign the jurat. In the face of the Petitioners' claimed belief, the district court's grant of summary judgment violates Rule 56(c) of the Federal Rules of Civil Procedure because the very terms of the Form 1040 jurat make the Petitioners' "knowledge and belief" a genuine issue of historical fact intended by law to govern their decision to sign or not to sign the jurat. As the court itself stated,

> "A judge may assess the persuasiveness of the evidence and may discount unpersuasive evidence as unspecific or immaterial, but *not unbelievable*." (Pp. 1015-1016, emphasized.)

Nevertheless, in the face of the plain language of the perjury statute §7206, the terms of the prescribed jurat, and the claimed and stated "knowledge and belief" of the Petitioners with respect to the Form 1040, the district court granted summary judgment to the government in clear violation of Rule 56(c). This breach of Rule 56(c) violated the Petitioners' right to due process of law and for this reason, if no other, the court below erred in dismissing the Petitioners' appeal.

QUESTION 4

WAS THE PETITIONERS' RIGHT TO DUE PROCESS VIOLATED BY IRS FAILURE TO COMPLY WITH THE §6203 MANDATE TO FURNISH THEM WITH THEIR REQUESTED COPY OF THE ASSESSMENT FORM 23-C?

On April 12, 1990, the IRS issued an internal memo with the heading, "Form 23 C Recovery Effort -Operational Instructions." (Plts. Exhs. L and W.) Attachment I of the memo titled "*Service Center 23C Recovery Procedures*" admits that,

> "... 31 assessment Certificates (Forms 23C) were not *signed* on the day of assessment in the last five years." (Emphasis added.)

Furthermore, Attachment III of the memo under the heading, "*Collection Recovery Procedures [:] Assessments Needing New 23C Dates*," states:

> "Returns Processing and Accounting Division has identified 31 assessment documents, five weekly composite lists and 26 daily lists, which were not *signed* in accordance with Treasury Regulation

301.6203-1. Since the assessments were not properly made, all subsequent actions taken in reliance on a properly assessed liability were *invalid*." (Emphasis added.)

The memo also admits that these illegal assessment procedures were made over a five-year period of time; this time period includes the time in which the Petitioners were allegedly assessed $500.00. The $500.00 assessment against the Plaintiffs was allegedly made on Assessment Certificate "Form 23C" that was *referenced* on Form 6335 that was mailed to the Plaintiffs. (Pltf. Exh. A.) The IRS memo reveals the possibility that the Form 23-C allegedly used to assess the penalty against the Petitioners was not properly signed and dated by an assessment officer delegated with that responsibility.

On page 6, ¶ 7, of Petitioners' original Form 843 claim (Pltf. Exh. B) and on page 10, ¶ 8, of the Petitioners' amended Form 843 claim (Pltf. Exh. D), the Petitioners requested under authority of 26 U.S.C. §6203, a copy of the Form 23-C Assessment Certificate that would indicate whether improper assessment procedures as mentioned in the aforesaid IRS memo occurred in the instant case. The IRS is required under 26 U.S.C. §6203 to comply with this request but failed to do so and thus the Petitioners' Fifth Amendment right to due process of law was violated.

QUESTION 5

DID THE DISTRICT COURT COMMIT REVERSIBLE ERROR BY GRANTING TO THE RESPONDENT SUMMARY JUDGMENT WHEN THE IRS INTERNAL MEMORANDUM CLEARLY INDICATES THE POSSIBILITY THAT THE $500 PENALTY AGAINST PETITIONERS WAS NOT PROPERLY ASSESSED?

The Court in *Mosher , supra*, cited as controlling the instant case, stated:

"When the District Court's summary judgment decision is at issue on appeal, all reasonable inferences must be resolved in favor of the party opposing the motion. *Thornbrough v. Columbus and Greenville Railroad Co.*, 760 F.2d 633, 640 (5th Cir. 1985). 'The party who defended against the motion for summary judgment must have his allegations taken as true and must receive the benefit of the doubt when his assertions conflict with those of the movant.' Id. (citing *E. C. Ernst, Inc. v. General Motors Corps.*, 537 F.2d 105, 108 (5th Cir. 1976)."'

Despite its reference to F.R.C.P. 56(c) concerning the granting of summary judgment, the district court gave only lip service to the rule as indicated by the court's failure, in its decision, to devote one word about the implication that it is possible that the Petitioners were not *legally* assessed the $500 penalty because of improper assessment procedures admitted in the memo. The memo thus raised doubts about the legality of the IRS procedures used in assessing the $500 against the Petitioners and such doubts under Rule 56(c) should have been resolved in favor of the Petitioners who defended against the government's summary judgment motion.

At this point in the district court proceedings the burden of proof lay upon the government "as to whether or not any person is liable for a penalty under section 6700, 6701, or 6702...." By its unwillingness or inability to produce the required Form 23-C to prove the validity of the penalty, the government utterly failed to meet its statutory burden of proof; because of the damaging admissions in the memo whose placement in the record was not objected to, the appellate court was duty-bound to overturn the lower court's grant of summary judgment to the government. But the court below also completely disregarded the IRS memo in its decision to dismiss the Petitioners' appeal.

The following un-numbered footnote about the assessment Form 23-C appeared on page 21 of the government's reply brief:

> "We further note that, on brief, taxpayers assert (Br. 45-48) that it is possible that the Form 23-C on which the penalty was assessed was not properly signed by the assessment officer. We have been informed however, that the 23-C was properly signed by the assessment officer on March 26, 1990."

In their reply brief the Petitioners noted:

> "The un-numbered footnote in Appellee's reply (Br. 21) about Form 23-C appears as an attempt to bury the matter and is mere, unfounded assertion and is not *[sic]* part of the record."

Such information as alleged is mere hearsay. If the Form 23-C was properly executed and processed why was a copy of it not supplied to the Petitioners as §6203 requires? Again, under Rule 56(c) such doubts and inferences that the IRS memo raised should have been resolved in favor of the Petitioners.

QUESTION 6

IS IT LOGICALLY AND LEGALLY POSSIBLE FOR *LUCAS V. PILLIOD LUMBER CO.*, 281 U.S. 245 (1930), TO BE APPOSITE TO THE INSTANT CASE?

As argued in their opening and reply briefs, the Petitioners contend that *Pilliod* is inapposite to the instant case for at least three reasons: (1) *Pilliod* was decided four years *before* T.D. 4512 was promulgated pursuant to the Revenue Act of 1934 that described and regulated for the first time the procedure of how certain individuals and spouses shall "make under oath a return" by signing the Form 1040, (2) *Pilliod* was governed solely by *corporate* tax law, and (3) no *individual* in *Pilliod* was *personally* liable for a penalty for not signing a tax form.

The Petitioners thus contend that *Pilliod* is inapposite to the Petitioners' failure to sign the jurat of a 1988 Form 1040. It is chronologically impossible that *Pilliod* could be relevant to the provisions of Paragraph A, Section 51 of the Revenue Act of 1934 or to the provisions in T.D. 4512 pursuant to the Act because at the time *Pilliod* was decided the provisions relating to the signing a Form 1040 had not even been enacted into law.

The case of *Pilliod* concerned the filing of *corporate* tax forms, in particular Form 1031T and Form 1120, which when filed under the Revenue Act of 1924 "require[d] corporations to make returns like those prescribed by the Act of 1918." See *Pilliod* at 247. Section 239 of the Revenue Act of 1918 states in part:

> "That every corporation subject to taxation under this title shall make a return.... The return shall be sworn to by the president, vice president, or other principal officer and by the treasurer...."

The court below stated,

> "Even assuming *Pilliod* may be distinguishable, a cursory reading of the *Mosher* opinion reveals that the court relied on the Internal Revenue Code and other court opinions."

Neither the Internal Revenue Code nor court opinions provide any basis for undermining the *constitutional* distinctions between the *personal* rights of the Petitioners who are natural individuals and the *statutory* rights of non-living, state-created, legal entities such as corporations, agencies, partner-

ships, etc. The *corporate* law that controlled *Pilliod* is clearly irrelevant to *Mosher* as controlling the instant case in an attempt to regulate the Petitioners' First Amendment rights for the reason that *Mosher* and the instant case are cases in which natural individuals filed Form 1040 acting in their *personal* capacities, and who invoked at the jurat their *personal* protection provided by the Fifth Amendment against compelled self-incrimination, a privilege not enjoyed by corporations.

The Constitution and this Court's analyses of it make clear that unthinking, state-created entities like *Pilliod* Lumber Co. do not possess the *personal* rights, privileges and protections that the Plaintiffs as natural individuals enjoy under the Bill of Rights, such as: freedom of thought, freedom of belief and liberty of conscience under the First Amendment, the right to privacy of personal papers under the Fourth Amendment, and the right against compelled self-incrimination under the Fifth Amendment. Of Fifth Amendment protection, the Court in *United States v. White*, 322 U.S. 694 (1944), observed:

"The constitutional privilege against self-incrimination is essentially a personal one, applying only to natural individuals. ... It is designed to prevent the use of legal process to force from the lips of the accused individual the evidence necessary to produce and authenticate any personal documents or effects that might incriminate him. ... It protects the individual from any disclosure, in the form of oral testimony, documents or chattels, sought by legal process against him as a witness. ... Since the privilege against self-incrimination is a purely personal one, it cannot be utilized by or on behalf of any organization, such as a corporation. ... But individuals, when acting as representatives of a collective group, cannot be said to be exercising their personal rights and duties nor to be entitled to their purely personal privileges. Rather they assume the rights, duties and privileges of the artificial entity or association of which they are agents or officers and they are bound by its obligations. In their official capacity, therefore, they have no privilege against self-incrimination." [Cites omitted]

Plainly, *Pilliod* is inapposite to the case at hand.

CONCLUSION

It is clear in the instant case that the Fifth Circuit Court of Appeals has misconstrued and misapplied 26 U.S.C. §6702 and that its opinion conflicts with this Court's guidelines of a tax return. For these and all the foregoing reasons, this Court should grant this Petition for Writ of Certiorari.

RESPECTFULLY SUBMITTED,

Pitman A. Buck, Jr., *Pro Se*
2525 Sunnycrest
Texas City, TX 77590
(409) 948-3396

Nellwyn A. Buck, *Pro Se*
2525 Sunnycrest
Texas City, TX 77590
(409) 948-3396

APPENDIX

APPENDIX A

(Filed August 10, 1992)
Pitman A. BUCK, Jr. and Nellwyn A. Buck,
Plaintiffs-Appellants,

v.

UNITED STATES of America,
Defendant-Appellee.

No. 91-2973
Summary Calendar.

United States Court of Appeals,
Aug. 10, 1992.

Appeal from the United States District Court for the Southern District of Texas.

Before JOLLY, DAVIS, and SMITH, Circuit Judges.

PER CURIAM:

Pitman and Nellwyn Buck appeal from the district court's entry of summary judgment in favor of the United States in their civil suit to recover a penalty assessed for filing a frivolous tax return. 756 F.Supp.1014. We DISMISS the appeal as frivolous and assess sanctions against the Bucks.

I

The Bucks filed a Form 1040 purporting to be their 1988 federal income tax return. The following statement is printed on the Form 1040 above the space provided for the signatures of the taxpayers:

Under penalties of perjury, I declare that I have examined this return, and accompanying schedules and statements, and to the best of my knowledge and belief, they are true, correct, and complete.

The Bucks did not sign the Form 1040 in the space provided, but instead wrote "Fifth Amendment," and referred to a cover letter and three "legal opinion letters" indicating that the filing of a return is voluntary. In their

cover letter, the Bucks explained that they intended to exercise their rights under the First, Fourth, and Fifth Amendments.

Pursuant to 26 U.S.C. §6702, the Internal Revenue Service (IRS) assessed a $500 penalty against the Bucks for filing a frivolous return. Following the procedures set forth in 26 §6703, the Bucks paid 15% of the penalty ($75), and filed an administrative claim for a refund, which the IRS denied.

II

The Bucks, proceeding *pro se*, filed suit for refund of the partial payment of the penalty and for abatement of the remainder of the penalty. The district court granted the government's motion for summary judgment and dismissed their claim. The Bucks timely appealed.

III

A

The Bucks primarily contend that requiring them to sign the Form 1040 would violate their Fifth Amendment right against self-incrimination and their First Amendment belief that wages are not income. They maintain that there are exceptions to the requirement that a taxpayer sign under penalty of perjury and that the district court placed improper reliance on *Mosher v. I.R.S.*, 775 F.2d 1292 (5th Cir. 1985), *cert. denied*, 475 U.S. 1123, 1123 S.Ct. 1645, 90 L.Ed.2d 189 (1986), in granting summary judgment in favor of the United States.

[1] Pursuant to 26 U.S.C. §6702,[1] the IRS may assess a civil penalty against an individual who files "what purports to be" a tax return when the return "does not contain information on which the substantial correctness of the self-assessment may be judged, and the filing of such a return is based on a frivolous position. 26 U.S.C. §6702; see *Anderson v. United States*, 754 F.2d 1270, 1271 (5th Cir. 1985." The absence of the Bucks' signatures on the return "precludes the IRS from judging the 'substantial correctness' of the return because the required 'information' that the return has been verified under 'penalty of perjury' is absent." *Mosher*, 775 F.2d at 1295 (quoting *Borgeson v. United States*, 757 F.2d 1071, 1073 (10th Cir. 1985). *Mosher* also establishes that the Bucks failure to sign the Form 1040 is based on a frivolous position. In *Mosher*, the taxpayer crossed out the jurat and typed the words "Violates Amend. V, U.S. Constitution" underneath the

stricken jurat. *Id.* at 1293. We held that Mosher's conduct was based on a frivolous position, because "there is no conceivable legal foundation for striking the jurat." *Id.* at 1295. As in *Mosher* the Bucks' failure to sign the Form 1040 is a sufficient basis for the assessment of the 6702 penalty.

The Bucks challenge *Mosher's* reliance on *Lucas v. Pilliod Lumber Co.*, 281 U.S. 245, 50 S.Ct. 297, 74 L.Ed. 829 (1930), for the proposition that an unsworn tax return fails to satisfy the requirements of law. The Bucks contend that *Pilliod* applied to requirements for a corporate entity and not for an individual. Their argument is frivolous. Even assuming *Pilliod* may be distinguishable, a cursory reading of the *Mosher* opinion reveals that the courts relied on the Internal Revenue Code and other court decisions; it is clear that *Pilliod* was not the sole basis for the decision in *Mosher*.

The Bucks further contend that §6702 is a penal statute, and argue that the district court failed to construe the provision narrowly. They also maintain that they were not informed of the specific "charge" against them before they were required to file an action under §6703 to challenge the assessment of the penalty. The penalty is clearly denoted as a civil penalty in the statutory caption. Moreover, this court upheld §6702 against a challenge for vagueness, concluding that "a person of ordinary common sense could understand the conduct that is prohibited or subject to penalty." *Mosher*, 775 F.2d at 1295.

The Bucks assert that they were unaware of the basis for the denial of their administrative claim for a refund of the penalty, contending that the first and only time that they were notified of the reason for assessment of the penalty was in the government's motion for summary judgment. However, the Bucks solicited three opinion letters in connection with their decision not to sign the jurat and attached those letters to their complaint. The chal-lenged 1040 form was complete in all respects other than their failure to sign the jurat. The Bucks cannot complain that they were unaware of the reason for the assessment of the penalty.

The Bucks argue that an unsigned return is not a "return" and, therefore, they cannot be assessed a penalty for filing a frivolous return. In addition to being raised for the first time on appeal, their argument is patently frivolous. Section 6702 provides for the assessment of a penalty against an individual who files "what purports to be" a tax return.

The Bucks contend that requiring them to sign the jurat or be subjected

to a penalty for the failure to do so infringes on their First Amendment right to believe that wages are not income, as their signatures on the Form 1040 would indicate otherwise. This argument is specious. Noncompliance with the tax laws is not protected by the First Amendment. *Mosher*, 775 F.2d at 1295; see also *United States v. Lee*, 455 U.S. 252, 260, 102 S.Ct. 1051, 1056, 71 L.Ed.2d 127 (1982) (the maintenance of a functional federal tax system is a sufficiently important governmental interest to justify incidental regulation of first Amendment rights).

The undisputed facts show that the Bucks prevented the Commissioner of Internal Revenue from judging the substantial correctness of their Form 1040, and that the Bucks' filing of the unsigned return is based on a frivolous position. Accordingly, the district court correctly granted summary judgment in favor of the United States.

B

[2] The United States requests an award of $1,500 in lieu of costs and attorney's fees as sanctions against the Bucks for filing a frivolous return. Rule 38 of the Federal Rules of Appellate Procedure authorizes us to "award just damages and single or double costs to the appellee" if we determine that an appeal is frivolous. "[A] frivolous appeal is an appeal in which 'the result is obvious or the arguments of error are wholly without merit.'" *Montgomery v. United States*, 933 F.2d 348, 350 (5th Cir.1991) (quoting Coghlan v. Starkey, 852 F.2d 806, 811 (5th Cir.1988)). Claims such as those presented by the Bucks have been authoritatively rejected by this court, and are wholly without merit. We therefore conclude that the appeal is frivolous. we further find that an award of $1,500 in lieu of costs and attorney's fees is reasonable, and we award damages of that amount in favor of the United States and against the Bucks. Although that amount will not cover all of the costs of this appeal, the award is intended to deter the Bucks and other tax protesters from prosecuting future frivolous appeals.[2]

IV

Because this appeal is frivolous, it is DISMISSED. See Local Rule 42.2.

[Footnote] 1. 26 U.S.C. §6702 provides:

(a) CIVIL PENALTY.—If—

(1) any individual files what purports to be a return of the tax imposed by subtitle A but which—

(A) does not contain information on which the substantial correctness of the self-assessment may be judged, or

(B) contains information that on its face indicates that the self-assessment is substantially incorrect; and

(2) the conduct referred to in paragraph (1) is due to—

(A) a position which is frivolous, or

(B) a desire (which appears on the purported return) to delay or impede the administration of Federal income tax laws, then such individual shall pay a penalty of $500.00.

[Footnote] 2. Although only the 1988 return is at issue in this appeal, we take note of the Bucks' statement in their brief that they have "been penalized $500.00 for two consecutive years now (perhaps soon to be three)."

APPENDIX B

(Filed February 28, 1991)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

Pitman A. Buck, Jr. and Nellwyn A. Buck, Jr., Plaintiffs,

VS.

The United States of America, Defendant.

CIVIL ACTION No. G-90-249.

FINAL SUMMARY JUDGMENT

KENT, District Judge.

Pending before the Court is the Defendant's Motion to Dismiss or for Summary Judgment (Instrument #5), filed December 4, 1990. The Court is of the opinion that this Motion should be and is hereby GRANTED for reasons set forth below.

The Facts

The Plaintiffs in this case are husband and wife and are United States citizens. On or about October 31, 1989, the Defendant United States sent the Plaintiffs a letter threatening them with criminal prosecution under 26 U.S.C. §7203 for willful failure to file a return. For the tax year 1988. the Plaintiffs had not signed their tax return, instead, in the signature block they indicated "Fifth Amendment."

When the Plaintiffs failed to file a proper return within the specified time limit, the Defendant then assessed a penalty of $500 pursuant to 26 U.S.C. §6702 against the Plaintiffs. The Plaintiffs paid 15% ($75) of the penalty assessed and then filed for a refund and abatement. After their claim had been denied, the Plaintiffs then filed suit in this Court as is their right.

The basis of this suit is that the Plaintiffs failed to sign their IRS 1040 return for the tax year 1988. They allegedly based that decision upon the receipt of legal opinions from several attorneys who informed them that they could not sign a 1040 return form without waiving their Fifth Amendment rights.

The Plaintiffs, classifying themselves as "nontaxpayers," claim the statute "... is unconstitutional or that its use is improper and illegal as applied to them. They also claim that the use of these statutes violates their rights to due process of law, penalizes Plaintiffs' right under the First Amendment to maintain a free conscience as to their beliefs, violates their right to be secure in their persons, house, papers and effects as provided by the Fourth Amendment, and violates their right not to be compelled to condemn themselves or to incriminate themselves." (Instr. #1).

Summary Judgment

Summary judgment is proper where no genuine issue as to any material fact exists. Fed.R. Civ.P. 56(c) provides that summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." The Supreme Court has clearly stated that there is no genuine issue of fact where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party. *Matsushita Electric Industrial Co. v. Zinith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). In *Leonard v. Dixie Well Service & Supply, Inc.*, 828 F.2d 291, 294 (5th Cir.1987), the Court, quoting from *Matsushita, supra,* and *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986), declared:

> "... once the movant has informed the district court of the basis of its motion and identified those portions of the record which it believes demonstrate the absence of a genuine issue of a material fact, the burden shifts to the non-movant to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. A sufficient showing cannot rest on mere allegations or denials in the pleadings, but must set forth specific facts that establish an issue for trial."

Facts are material for summary judgment purposes where they constitute

a legal defense, or their existence or nonexistence might affect the result of the action, or when resolution of issues they raise is so essential that the party against whom it is decided cannot prevail. *Odom v. Tripp*, 575 F.Supp. 1491 (D.C.Mo.1983).

The Supreme Court directs a judge when ruling on a summary judgment motion to believe the evidence of a non-moving party and to draw all justifiable inferences in his favor. Credibility determinations are to be left to the trier of fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 2513, 91 L.Ed.2d 202 (1986). A judge may assess the persuasiveness of the evidence and may discount unpersuasive evidence as unspecific or immaterial, but not unbelievable. *Leonard*, 828 F.2d at 294. "The inquiry performed is the threshold inquiry of determining whether there is the need for a trial - whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson*, 477 U.S. at 249, 106 S.Ct. at 2511.

Statutory Authority

The Internal Revenue Service assessed a penalty against these Plaintiff-taxpayers in accordance with 26 U.S.C. §6702 which governs the filing of frivolous returns. 26 U.S.C. §6702(a) provides for "(a) a civil penalty if:

(1) any individual files what purports to be a return of the tax imposed by subtitle A but which-

(A) does not contain information on which the substantial correctness of the self-assessment may be judged, or

(B) contains information that on its face indicates that the self-assessment is substantially incorrect; and

(2) the conduct referred to in paragraph (1) is due to-

(A) a position which is frivolous, or

(B) a desire (which appears on the purported return) to delay or impede the administration of Federal income tax laws,

then such individual shall pay a penalty of $500."

While this Court genuinely sympathizes with the predicament the

Plaintiffs find themselves in given their personal philosophy, nevertheless, it believes this case is clearly governed by the Fifth Circuit's ruling in *Mosher v. Internal Revenue Service*, 775 F.2d 1292 (5th Cir.1985) cert. denied 475 U.S. 1123, 106 S.Ct. 1645, 90 L.Ed.2d 189 (1986), and that summary judgment for the Defendant is consequently proper.

Mosher did not dispute that he was required to file an income tax return or that he was a taxpayer. In the instant case, the Plaintiffs dispute that they are even taxpayers. The Court will address the issue of whether the Plaintiffs are taxpayers first.

Taxpayer Status

The Plaintiffs have taken a clearly untenable position as to their taxpayer status in light of the Internal Revenue Code provisions stating otherwise. 26 U.S.C. §1 imposes an tax on the income of married individuals, surviving spouses, heads of households, estates and trusts.

26 U.S.C. §61 defines gross income to include:

> "... **all income from whatever source derived,** including (but not limited to) the following items: (1) **Compensation for services,** including fees, commissions, fringe benefits, and similar items; (2) Gross income derived from business; (3) Gains derived from dealings in property; (4) Interest; (5) Rents; (6) Royalties; (7) Dividends; (8) Alimony and separate maintenance payments; (9) Annuities; (10) Income from life insurance and endowment contracts (11) Pensions; (12) Income from discharge from indebtedness; (13) Distributive share of partnership gross income; (14) Income in respect of a decedent; (15) Income from and interest in an estate or trust [emphasis added]."

The Plaintiffs, married individuals with gross income, are clearly included within the scope of the statutes. While noting that Plaintiffs sincerely disagree as a matter of philosophy, this Court finds that they are taxpayers as a matter of both fact and law, and as such they must file tax returns. Because the Plaintiffs failed to file a proper return, the IRS was warranted in assessing a penalty in accordance with 26 U.S.C. §6702.

Good Faith

In attempting to demonstrate their good faith belief that they may claim

a Fifth Amendment privilege allowing them to refuse to sign their tax return, these Plaintiff-taxpayers have presented evidence that they relied on legal advise in adopting that position. Unfortunately for these taxpayers, the law is very clear that a taxpayer's assertion of good faith is irrelevant under 26 U.S.C. §6702. *Hudson v. United States*, 766 F.2d 1288 (9th Cir. 1985). In *Knottnerus v. United States*, 582 F.Supp. 1572 (D.C.Ill.1984), the court held that a taxpayer's state of mind when filing a tax return is not part of the test as to whether the return is frivolous so as to warrant an assessment of a $500 civil penalty and thus, the taxpayer's good faith in filing a return does not preclude the penalty.

Mosher v. I.R.S. is Controlling

In *Mosher*, the taxpayer crossed out the jurat at the end of the IRS 1040 form which declared that the form was "true, correct, and complete" to the best of the taxpayer's knowledge and belief. Underneath the stricken words the taxpayer typed, "Violates Amendment V, U.S. Constitution." The taxpayer was assessed a frivolous return penalty pursuant to §6702 after being informed by the IRS of their inability to process such a return. As in the instant case, Mosher paid $75 (15% of the assessed penalty) and filed a claim for a refund. In response to the government's motion for summary judgment, Mosher argued that the jurat violated the Fifth Amendment's prohibition against self-incrimination. The district court in granting summary judgment found otherwise, and concluded that the specialty provisions of section 6702 were applicable. The Fifth Circuit affirmed.

Citing *Anderson v. United States*, 754 F.2d 1270, 1271, (5th Cir.1985), the Mosher court stated, "Under 26 U.S.C. §6702, the IRS may impose a $500 penalty on any individual who files 'what purports to be' a tax return when such return (1) does not contain information on which the substantial correctness of the self-assessment may be judged, and (2) is based on a frivolous position." 775 F.2d 1292, 1294. The court found that by crossing out the jurat, Mosher refused to certify that the form was correct, thereby preventing the IRS for being able to properly process his return. They found that when faced with a similar situation, the Tenth Circuit in *Borgeson v. United States*, 757 F.2d 1071, 1073 (10th Cir.1985), concluded that the frivolous return penalty was properly imposed, and held that an income tax return which is not signed under penalties of perjury is invalid and cannot be processed by the IRS. The Fifth Circuit also quoted *Knighten v. Commissioner*, 702 F.2d 59, 61 (5th Cir.), cert. denied 464 U.S. 897, 104 S.Ct. 249, 78 L.Ed.2d 237 (1983) for the proposition, "It is well established

in this Circuit, however, that the submission of a 'return' from which tax liability cannot be computed does not satisfy the statutory obligation to file." 775 F.2d 1292, 1294.

As regarding the "frivolous' nature of the return, the Mosher court stated, "there can be no doubt regarding the status of a tax form that is not verified under penalties of perjury as the Supreme Court held over fifth years ago that an unsworn tax return failed to satisfy the requirements of law. *Lucas v. Pilliod Lumber Co.*, 281 U.S. 245, 50 S.Ct. 297, 74 L.Ed. 829 (1930). Moreover, the Internal Revenue Code requires that returns be verified under penalties of perjury and provides no exception to that rule. Code Sec. 6065 ... Since Mosher's return did not contain information on which the substantial correctness of the self-assessment could be judged, and Mosher's position was indeed frivolous, we conclude the civil penalty was properly imposed." Id., p. 1295.

The *Mosher* court concluded by addressing Mosher's Constitutional arguments: "Mosher was not denied a right to a jury trial since no genuine issue of fact remained that required a trial. *Davis v. United States*, 742 F.2d 171, 173 (5th Cir. 1984). Mosher has not shown that the Fourth Amendment has an relevance whatever to these facts. Nor is noncompliance with the tax law protected by the First Amendment. *Borgeson*, 757 F.2d at 1073; *Franklet v. United States*, 578 F.Supp. 1552, 1556 (N.D.Cal.1984), aff'd 761 F.2d 529 (9th Cir.1985); *United States v. Malinowski*, 472 F.2d 850, 857 (3rd Cir.), cert. denied, 411 U.S. 970, 93 S.Ct. 2164, 36 L.Ed.2d 693 (1973). The statute is not unconstitutionally vague as a person of ordinary common sense could understand the conduct that is prohibited or subject to penalty. See *Arnett v. Kennedy*, 416 U.S. 134, 159-163, 94 S.Ct. 1633, 1646-49, 40 L.Ed.2d 15 (1974)." 775 F.2d at 1295.

After considering Defendant's Motion to Dismiss or for Summary Judgment in the light most favorable to the non-moving party, the Plaintiffs, this Court has determined that no genuine issues of fact exist. The Fifth Circuit's holding in *Mosher v. Internal Revenue Service* controls, and therefore, this Court must GRANT summary judgment for the Defendant, the United States of America.

It is therefore ORDERED that the Defendant's Motion to Dismiss or for Summary Judgment be GRANTED. Summary judgment is so ORDERED. THIS IS A FINAL JUDGMENT. Costs herein to date are assessed against Plaintiffs, for which let execution issue.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-2973

PITMAN A. BUCK, JR. and NELLWYN A. BUCK,
Plaintiffs-Appellants,
versus
UNITED STATES OF AMERICA,
Defendant-Appellee.

Appeal from the United States District
Court for the Southern District of Texas

ON SUGGESTION FOR REHEARING EN BANC

(Opinion 8-10-92, 5 Cir., 198_,
_____F.2d____)
(September 14, 1992)

Before JOLLY, DAVIS and SMITH, Circuit Judges.

PER CURIAM:

(x) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT,
[Signed by, E. Grady Jolly]
United States Circuit Judge

APPENDIX D

(Filed June 5, 1991)
IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-2458
USDC No. CA-G-90-249

PITMAN A. BUCK. and NELLWYN A. BUCK,
Plaintiffs,
PITMAN A. BUCK, JR.,
Plaintiff-Appellant,
versus
UNITED STATES OF AMERICA
Defendant-Appellee,

Appeal from the United States District
Court for the Southern District of Texas

Before THORNBERRY, JOLLY, and DAVIS, Circuit Judges.

BY THE COURT:

This Court must examine the basis of its jurisdiction on its own motion if necessary. Mosley v. Cozby, 813 F.2d 659, 660 (5th Cir. 1987). An examination of the record in this case discloses that no final judgment has been entered as a separate document as required by Fed. R. Civ. P. 58.

On February 28, 1991, the district court entered an order granting defendant's motion for summary judgment in this tax action. On April 26, 1991, Pitman A. Buck, Jr. filed a notice of appeal on his own behalf and purportedly on behalf of Nellwyn A. Buck.

Although the February 28 order disposes of the litigation, it contains the analysis and reasons for the decision and is therefore not a "separate document" judgment as required by Rule 58. '[A] statement tacked on at the

end of an opinion . . . is considered part of the opinion, and is not properly a judgment until it is set forth on a separate document." See 6A J. Moore, J. Luca, G. Grotheer, MOORE'S FEDERAL PRACTICE, 58.02, at 58-11 (2d ed. 1991) (footnote omitted). See also Bankers Trust Co. v. Mallis, 435 U.S. 381, 98 S.Ct. 1117, 55 L.Ed. 357 (1978). If we were to treat the order as a Rule 58 judgment, Nellwyn A. Buck would not be a party to the appeal because she failed to sign the notice of appeal. See Mikeska v. Collins, 928 F.2d (5th Cir. 1991). Under the present circumstances, we follow the procedure adopted in Townsend v. Lucas, 745 F.2d 933. 934 (5th Cir. 1984), and dismiss the appeal. The plaintiffs may rectify the lack of a separate document judgment by a motion to the district court for entry of judgment. They may then appeal from that judgment within the time prescribed by Rule 4(a)(1). See id.

APPEAL DISMISSED.
(Initialed by THORNBERRY, JOLLY, and DAVIS)

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

PITMAN A. BUCK, JR. and NELLWYN A. BUCK,
Plaintiff,
VS.
CIVIL ACTION
No. G-90-249
UNITED STATES OF AMERICA,
Defendant.

FINAL JUDGMENT

For the reasons stated in this Court's Order Granting Motion to Dismiss and Granting Summary Judgment (instr.# 14), filed February 28, 1991, the above-styled action is hereby DISMISSED. This Order is entered pursuant to the Fifth Circuit's Order, filed June 5, 1991, in Case No. 91-2458 (USDC No. G-90-249), to correct the defect of this Court's failure to file a "separate document" judgment as required by Fed. R. Civ. P. Rule 58.

This is a FINAL JUDGMENT.

DONE at Galveston, Texas, this the 1st day of July, 1991.

(Signed by Samuel B. Kent,
United States District Judge)

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-2973
Summary Calendar

D.C. Docket No. CA-G-90-249

PITMAN A. BUCK, JR. and NELLWYN A. BUCK,
Plaintiffs-Appellants,
versus
UNITED STATES OF AMERICA
Defendant-Appellee.

Before JOLLY, DAVIS, and SMITH,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was taken under submission on the briefs on file.

ON CONSIDERATION WHEREOF, It is now ordered and adjudged by this Court that the appeal in this cause is dismissed as frivolous.

IT IS FURTHER ORDERED that plaintiffs-appellants pay to defendant-appellee the costs on appeal to be taxed by the Clerk of this Court.

August 10, 1992

ISSUED AS MANDATE: Oct. 6, 1992
/s/ Mary Frances Vrsaljko, Deputy Clerk

APPENDIX G

CONSTITUTION
Amendment I

Congress shall make no law respecting an establishing of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceable to assemble, and to petition the Government for a redress of grievances.

APPENDIX H

CONSTITUTION
Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath, or affirmation, and particularly describing the place to be searched, and the persons and things to be seized.

APPENDIX I

CONSTITUTION
Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or Naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX J

Internal Revenue Code, Section 7206

Any person who-

(1) DECLARATION UNDER PENALTIES OF PERJURY.-

Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter ... shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation) or imprisoned not more than 3 years, or both, together with the costs of prosecution.

APPENDIX K

Internal Revenue Code, Section 6702(a)

(a) CIVIL PENALTY.—If—

(1) any individual files what purports to be a return of the tax imposed by subtitle A but which—

(A) does not contain information on which the substantial correctness of the self-assessment may be judged, or

(B) contains information that on its face indicates that the self-assessment is substantially incorrect; and

(2) the conduct referred to in paragraph (1) is due to—

(A) a position which is frivolous, or

(B) a desire (which appears on the purported return) to delay or impede the administration of Federal income tax laws, then such individual shall pay a penalty of $500.00.